Supreme Court, U.S.
FILED
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No. 02-50

IN THE

Supreme Court of the United States

ANDREW J. KEHOE, JR. and JENNIFER M. KEHOE,

Petitioners,

v.

GARY CRUICKSHANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

JANET KENTON-WALKER
Counsel of Record
JAMES C. GROSS
KLIEMAN, LYONS,
SCHINDLER & GROSS
Attorneys for Respondent
Gary W. Cruickshank
Chapter 7 Trustee
21 Custom House Street
Boston, MA 02110
(617) 443-1000

176073

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Table of Appendices iii

Reasons For Denying The Writ 1

I. There Is No Conflict Among The Circuits Regarding The Interpretation Of Section 363(m) 7

II. Even Assuming That A Conflict Exists With Respect To The Application Of Section 363(m), The Petition Presents A Poor Case For Resolving The Conflict 12

III. The Petitioners' Argument Regarding The Alleged Violation Of Their Due Process Rights Was Adequately Addressed And Rejected By The First Circuit 13

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

Development Company of America v. Adamson Company, Inc. (In re Adamson Company, Inc.), 159 F.3d 896 (4th Cir. 1998) 10

Ginther v. The Ginther Trusts (In the Matter of The Ginther Trusts), 238 F.3d 686 (5th Cir. 2001) 9, 10

In the Matter of Lloyd, 37 F.3d 271 (7th Cir. 1994) 7

In re Pence, 905 F.2d 1107 (7th Cir. 1990) 14

Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc., 141 F.3d 490 (3d Cir. 1997) 7

Wintz v. American Freightways, Inc. (In re Wintz Companies), 219 F.3d 807 (8th Cir. 2000) 7, 9

Statutes:

11 U.S.C. § 101, *et seq.* 3

11 U.S.C. § 363(m) ..... *passim*

11 U.S.C. § 541 4

Rule 7001 of the Federal Rules of Bankruptcy Procedure 13

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States District Court District Of Massachusetts Dated October 25, 2000 ..... 1a

Appendix B — Judgment Of Dismissal Of The United States District Court District Of Massachusetts Dated October 25, 2000 ..... 3a

REASONS FOR DENYING THE WRIT

In the underlying case, the United States Bankruptcy Court for the District of Massachusetts (the "Bankruptcy Court") authorized Gary Cruickshank, the Chapter 7 trustee (the "Trustee") of the estate of Andrew J. Kehoe and Catherine M. Kehoe (the "Debtors") to sell two parcels of real property, which the Bankruptcy Court had previously determined were property of the Debtors' bankruptcy estate. The Petitioners, the adult children of the Debtors, having failed to challenge the Bankruptcy Court's determination that the real property in question was property of the Debtors' estate despite having received adequate notice of the motion and the hearing thereon, subsequently challenged the Trustee's attempts to sell each of the properties. Having been unsuccessful in opposing the sales first before the Bankruptcy Court and thereafter before the United States District Court for the District of Massachusetts (the "District Court") and the Court of Appeals for the First Circuit (the "First Circuit"), the Petitioners now request this Honorable Court to grant it a writ of certiorari.

To justify their request for certiorari, the Petitioners assert that the First Circuit improperly applied Section 363(m) of the Bankruptcy Code (11 U.S.C. § 363(m)). Specifically, the Petitioners contend that the First Circuit inappropriately failed to recognize and apply the "measure of effective relief" exception to Section 363(m), and, moreover, that the First Circuit's ruling on that issue is in direct conflict with the decisions of other circuits on the issue. The Petitioners conclude that certiorari should be granted by this Court to resolve the conflict regarding the correct interpretation of Section 363(m) and the application of the "measure of effective relief" exception.

In response to the Petitioners' contentions, the Trustee asserts that there is no conflict among the circuits with respect to the correct interpretation of Section 363(m) or with regard to the application of the "measure of effective relief" exception thereto. Moreover, even assuming that this Court were to determine that such conflict does exist, the Petition For Writ Of Certiorari (the "Petition") presents a poor case for resolving the apparent "conflict" because: (1) the First Circuit does, in fact, recognize the "measure of relief exception", but declined to apply it in this instance based upon "the facts of this case"; and (2) throughout the entire proceeding, the Petitioners, on numerous occasions, failed to pursue the various procedural rights and remedies available to them to oppose the sales, and, their failure to pursue these rights should not, in essence, be rewarded by the granting of their Petition.

The final issue raised by the Petitioners is their assertion that the First Circuit incorrectly determined that their due process rights had not been violated in connection with the sale of the properties. The Petitioners request that this Court establish the due process requirements to be followed in connection with a sale of property in a bankruptcy proceeding.

The Trustee maintains that, based upon the facts and circumstances of this case, the First Circuit quite correctly determined that the Petitioners' due process rights were not violated. As the Court noted, the Petitioners "received due notice of all relevant actions before their rights were affected." Moreover, even a cursory review of the circumstances reveal that the Petitioners failed to pursue the procedural rights that were available to them to challenge the sales and, therefore, waived those rights.

The Trustee further notes that the Petitioners' explicit acknowledgment that the First Circuit decided the due process issue (although wrongly decided from the Petitioners' viewpoint), belies their underlying premise in their request for certiorari, namely, that the First Circuit simply dismissed their appeal as moot pursuant to Section 363(m). Had that in fact been the determination of the First Circuit, its ruling on the due process issue (as well as the other issues it decided in its opinion) clearly would have been unnecessary.

In their Statement of the Case, the Petitioners omit several significant facts which are relevant to this Court's determination whether to grant the Petitioners' request for certiorari. Accordingly, a brief description of the case and its factual background are set forth below.

The Debtors commenced the underlying bankruptcy proceedings on January 25, 1996 (the "Petition Date") by filing a joint voluntary petition for relief pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code"). On September 23, 1997, the Debtors' Chapter 11 petition was converted to a Chapter 7 case (the "Conversion Date").

As of the Conversion Date, the Debtors' assets included, *inter alia*, an interest in the JK Realty Trust, which held title to the real property located at 555 Ashmont Street, Dorchester, Massachusetts (the "Ashmont Street Property") and an interest in the Lafield-Bearse Realty Trust, which held title to the real property located at 5 Bearse Avenue, Dorchester, Massachusetts (the "Bearse Avenue Property"). On August 20, 1999, the Trustee filed the Trustee's Motion For Entry Of An Order Determining That Properties Held By The JK Realty Trust And Lafield-Bearse Realty Trust Are

Property Of The Estate, Or Alternatively, For An Order Authorizing Revocation Of Trusts (the "Trust Motion"). In that motion, the Trustee requested the Bankruptcy Court enter an order determining that the JK Realty Trust and the Lafield-Bearse Realty Trust were sham trusts and that the properties held by each of the trusts, namely, the Ashmont Street Property and the Bearse Avenue Property (collectively, the "Properties") were property of the Debtors' estate pursuant to Section 541 of the Bankruptcy Code. Alternatively, the Trustee requested the entry of an order authorizing him to revoke each of the trusts.

The Trust Motion was duly served upon all creditors, the Debtors, their counsel of record, and the Petitioners and their counsel of record. On August 30, 1999, the Trustee served notice of the hearing on the Trust Motion and the deadline for objections thereto, on all creditors, the Debtors, their counsel, and the Petitioners and their counsel. The Petitioners have never contended and do not now contend that they did not receive due and adequate notice of the Trust Motion and the hearing thereon. However, the Petitioners did not file an objection to the Trust Motion nor did they appear (or have counsel appear on their behalf) at the hearing on the Trust Motion. The Debtors alone filed an objection to the Trust Motion.

The hearing on the Trust Motion and the Debtors' objection thereto was held before the Bankruptcy Court on September 15, 1999. At the conclusion of the hearing, after consideration of the submission of the parties, the arguments presented at the hearing and the record in the proceeding, the Bankruptcy Court granted the Trust Motion, and read into the record its findings, rulings and basis for its decision. On September 23, 1999, the Bankruptcy Court entered its

formal order granting the Trust Motion and determining that the Properties were property of the Debtors' bankruptcy estate.[1]

Subsequent to the entry of the order by the Bankruptcy Court granting the Trust Motion, the Trustee initiated the process of selling both the Ashmont Street Property and the Bearse Avenue Property. The Petitioners have correctly indicated in the Petition the dates that the Trustee filed motions seeking authority from the Bankruptcy Court to sell each of these properties and the date of the orders entered by that court authorizing such sales. However, with respect to each of the sales, the Petitioners have again failed to provide this Court with all of the facts relevant to rendering a decision on the Petition.

With regard to the sale of the Ashmont Street Property, the Petitioners accurately note that on April 10, 2000, the Bankruptcy Court entered an order authorizing the Trustee to sell that property, and that the Petitioners objected to the sale and timely sought an appeal of the Bankruptcy Court's order. However, the Petitioners neglect to disclose that they failed to seek a stay of the order authorizing the sale from the Bankruptcy Court, the District Court or from the First Circuit. Since no stay had been requested or obtained by the Petitioners, on May 25, 2000 the Trustee consummated the sale of the Ashmont Street Property.

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1. A copy of the Order Determining That Properties Held By The JK Realty Trust And Lafield-Bearse Realty Trust Are Property Of The Debtors' Estate is attached as Appendix "A" to the Petitioners' Petition For Writ Of Certiorari. In that Order, the Bankruptcy Court found that the Petitioners had received proper, timely and sufficient notice of the Trust Motion and the hearing thereon, and that the Petitioners did not file any objection to the Trust Motion.

In view of the fact that the sale of the Ashmont Street Property had taken place, on July 12, 2000, the Trustee filed a motion with the District Court seeking to dismiss the Petitioners' appeal. In that motion, the Trustee asserted that the appeal had become moot because the Petitioners had not obtained a stay of the Bankruptcy Court's order authorizing the sale and that the sale of the property to a good faith purchaser had been consummated. Despite the fact that the Petitioners had sought and were granted an extension of the time to respond to the Trustee's motion to dismiss their appeal, the Petitioners failed to file any response to the motion to dismiss. In granting the Trustee's motion to dismiss the Petitioners' appeal, the District Court noted that no opposition had been filed thereto. (A copy of the District Court's order granting the Trustee's motion to dismiss the appeal and the Judgment of Dismissal of the Petitioners' appeal are annexed hereto in Appendix "A" and "B" respectively.)

With regard to the Bearse Avenue Property, on February 22, 2000, the Petitioners assert that they filed an appeal of the Bankruptcy Court's order authorizing the sale of that property by the Trustee and unsuccessfully sought a stay of that order. However, in the Petition, the Petitioners fail to disclose that they waited almost eight months after filing the appeal before seeking a stay of the sale order.

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE INTERPRETATION OF SECTION 363(m)

Section 363(m) of the Bankruptcy Code provides that:[2]

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Courts of appeal have uniformly held that in the absence of a stay pending appeal, Section 363(m) prevents an appellate court from overturning or invalidating an authorized and completed sale to a good faith purchaser of the property. *Wintz v. American Freightways, Inc. (In re Wintz Companies)*, 219 F.3d 807, 811 (8th Cir. 2000); *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1997); *In the Matter of Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994).

The Petitioners do not suggest that there is any conflict among the circuits on the limitation that Section 363(m) places on the remedies available to appellate courts; rather,

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2. A copy of Section 363 of the Bankruptcy Code is annexed as Appendix "K" to the Petition.

the Petitioners assert that the conflict exists with respect to the application of the "measure of effective relief" exception to that statute. According to the Petitioners, the Third, Seventh and Tenth Circuits recognize the "measure of effective relief" exception to Section 363(m) and will not dismiss an appeal of a bankruptcy order authorizing a sale even if the appellants have failed to obtain a stay of the sale order if the appellate court can provide the appellant with some measure of meaningful relief.

The Petitioners assert that other circuits, namely, the Fourth, Fifth, and Eighth Circuits, apply a per se rule that if an appellant has failed to obtain a stay of an authorized sale and the sale is consummated, the entire appeal is moot. According to the Petitioners, these courts do not even address or recognize the "measure of effective relief" exception to Section 363(m). The Petitioners further contend that the First Circuit is among the circuits that apply the per se rule with regard to Section 363(m).

However, a careful examination of the recent decisions of the First, Fourth, Fifth and Eighth circuits cited by the Petitioners in support of their position reveals that no such conflict exists. Contrary to the position asserted by the Petitioners, these circuits do not simply apply a per se rule and dismiss the appeal where no stay of the sale order has been obtained. Instead, these decisions reflect that when presented with a request by appellants to apply the "measure of effective relief" exception, these courts address and recognize the existence of the exception to Section 363(m), but do not necessarily apply the exception if it is inappropriate to do so. Accordingly, contrary to the Petitioners' contention, no significant conflict exists with regard to the application of the "measure of effective relief" exception to Section 363(m).

In the *Wintz Companies* case, *supra*, the Eighth Circuit affirmed the order entered by the bankruptcy court which had authorized the sale of property to a third party. The appellants had requested a stay of the order authorizing the sale which request had been denied. Interpreting Section 363(m), the Eighth Circuit stated that as a general rule, in the absence of a stay of an order authorizing a sale, the statute prevents an appellate court from overturning a completed sale to a good faith purchaser. *Wintz*, 219 F.3d at 811. The Court noted that such rule not only protects the finality of bankruptcy sales, but "also reflects the inability of courts to supply a remedy once property has left the bankruptcy estate." *Id.* The Court further pointed out that once the property is sold any claims against the property may be maintained only against the proceeds of the sale.

It is clear that in its analysis, the Court in *Wintz* considered the issue of whether it would be appropriate to afford any type of relief to the appellants other than the overturning of the sale which it was precluded from doing by Section 363(m). This approach constituted an application of the "measure of effective relief" exception to Section 363(m) even though it was not labeled as such by the Court. However, in the appeal, the Court indicated that the appellants were not seeking recovery from the proceeds of the sale, but only to annul the sale. Accordingly, the Court held that the relief sought by the appellants was barred by Section 363(m) and affirmed the authorization of the sale of the property. The Court did not, as suggested by the Petitioners, simply dismiss the appeal as moot.

The Petitioners also cite the Fifth Circuit's opinion in *Ginther v. The Ginther Trusts (In the Matter of The Ginther Trusts)*, 238 F.3d 686 (5th Cir. 2001) and the Fourth Circuit's

decision in *Development Company of America v. Adamson Company, Inc. (In re Adamson Company, Inc.)*, 159 F.3d 896 (4th Cir. 1998) as further evidence of courts which do not recognize the "measure of effective relief" exception to Section 363(m). However, a close reading of each of those cases indicates that in each case, the appellants, who had failed to obtain a stay of the bankruptcy courts' orders authorizing the sales, were seeking only to overturn the respective sales. In each case, the appellants did not request any relief other than overturning the sales, which relief was barred by Section 363(m). In view of the limited relief sought by the appellants, the courts in these cases had no reason to determine whether any other relief could have been available to afford the appellants some "measure of effective relief". However, it can hardly be ascertained from the *Adamson Company* or the *Ginther Trusts* cases that the Fourth and Fifth Circuits would not address and/or recognize the "measure of effective relief" exception to Section 363(m) if such courts were presented with cases in which the appellants actually sought other relief in addition to seeking to invalidate authorized sales and the facts supported the granting of such other relief.

Finally, the Petitioners cite the decision by the First Circuit in the instant case as additional evidence that a conflict exists among the circuits with respect to the application of the "measure of effective relief" exception to Section 363(m). Based upon the decision entered by the First Circuit, the Petitioners conclude that the First Circuit does not address or recognize the exception to Section 363(m), and simply will dismiss an appeal as moot where the appellant has failed to obtain a stay of an order authorizing the sale of property. However, the Petitioners' reliance on the First Circuit's decision herein is misplaced.

An examination of the language of the First Circuit's opinion in the instant case in which it affirmed the orders authorizing the sales of the Properties, reflects that the Court did not simply apply a per se rule and dismiss the Petitioners' appeal as moot. Initially, the Court noted that since the Petitioners had failed to obtained a stay of the sale orders, "most of their claims to this court have been rendered moot." This statement obviously refers to the fact that the request by the Petitioners to undo the completed sales of the Properties was barred by Section 363(m), and rendered moot by that section. That interpretation of Section 363(m) is clearly consistent with the interpretation given to that statute by other circuits, all of whom recognize that Section 363(m) limits the remedies available to appellate courts where no stay of the sale order has been obtained.

However, the Court did not simply dismiss the Petitioners' appeal as moot because the sales of the Properties had been completed. Rather, the Court proceeded to address the other issues involved in the appeal, including whether it was appropriate to apply the "measure of effective relief" exception to Section 363(m). With regard to this specific issue, the Court concluded that based "on the facts of this case", it would not be appropriate to apply the exception. Thereafter, the Court addressed and ruled upon the other issues that had been raised by the Petitioners in their appeal, including whether the Petitioners were deprived of due process and whether the purchasers of the properties were good faith purchasers. The discussion engaged in by the Court and its rulings on those issues clearly reflect that the Court did not simply apply a per se rule and moot the Petitioners' appeal. Thus, the First Circuit's decision in the instant case lends no support whatever to the Petitioners' assertion that a conflict among the circuits exists with respect to the "measure of effective relief" exception.

II.

EVEN ASSUMING THAT A CONFLICT EXISTS WITH RESPECT TO THE APPLICATION OF SECTION 363(m), THE PETITION PRESENTS A POOR CASE FOR RESOLVING THE CONFLICT

Even assuming that this Honorable Court were to determine that a conflict among the circuits exists with regard to the application of the "measure of effective relief" exception to Section 363(m), the Petition presents a poor case for resolving the conflict. First, as described above, contrary to the Petitioners' assertion, the First Circuit addresses and recognizes the exception. The First Circuit determined that based upon the facts of the case it would not be appropriate to apply the exception in connection with the Petitioners' appeal. Thus, even if this Court were to grant the Petition and rule that the "measure of effective relief" exception was required to be addressed in appeals involving Section 363(m), such determination would provide no benefit to the Petitioners since the First Circuit has already addressed the exception in the instant case and determined that based upon the facts, it would not be appropriate to apply it.

Secondly, as noted above, the Petitioners have failed to pursue the numerous procedural rights available to them throughout the proceeding. Detailed above, these include a failure to initially object to the Bankruptcy Court's determination that the Properties were property of the Debtors' bankruptcy estate, a failure to seek a stay regarding the order authorizing the sale of the Ashmont Street Property, a failure to even contest the Trustee's motion to dismiss the Petitioners' appeal of the sale order regarding that property, and a failure to timely seek a stay with regard to the sale of

the Bearse Avenue Property. The Petitioners' failure to pursue the procedural rights otherwise available to them should not be rewarded by granting their Petition herein.

III.

THE PETITIONERS' ARGUMENT REGARDING THE ALLEGED VIOLATION OF THEIR DUE PROCESS RIGHTS WAS ADEQUATELY ADDRESSED AND REJECTED BY THE FIRST CIRCUIT

In the Petitioners' appeals of the orders of the Bankruptcy Court authorizing the sales of the Properties, the Petitioners asserted the same argument as they contend herein, namely, that the Bankruptcy Court was required to have proceeded by way of an adversary proceeding under Rule 7001 of the Federal Rules of Bankruptcy Procedure when it determined that the Properties were property of the Debtors' bankruptcy estate. In fact, that issue was fully briefed by the parties before the First Circuit. After a careful review of the parties' briefs and the record in the proceeding, the First Circuit rejected the Petitioners' contention and found that no due process violation of the Petitioners' rights had occurred. The Trustee submits that the First Circuit's determination on this issue is correct.

While a reiteration of the Trustee's argument why no due process violation of the Petitioners' rights occurred is not appropriate in the context of an opposition to the Petition,[3] one point should nevertheless be emphasized. It is not disputed by the Petitioners that they, and their counsel of

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3. In the event that the Petition were granted, the Trustee specifically reserves his right to fully address the due process issue.

record, received adequate and timely notice of the Trust Motion (which sought to determine that the Properties were property of the Debtors' estate), and the hearing thereon, and that the Petitioners failed to object to the motion and chose not to participate in the hearing on the motion. Such action by the Petitioners clearly constituted a waiver of their right to subsequently object to this procedure utilized by the Bankruptcy Court in selling the Properties. *In re Pence*, 905 F.2d 1107 (7th Cir. 1990).

CONCLUSION

For all of the foregoing reasons, the Trustee/Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

JANET KENTON-WALKER
Counsel of Record
JAMES C. GROSS
KLIEMAN, LYONS,
SCHINDLER & GROSS
Attorneys for Respondent
Gary W. Cruickshank
Chapter 7 Trustee
21 Custom House Street
Boston, MA 02110
(617) 443-1000

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS DATED OCTOBER 25, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Appeal No. 00-CV-11146-RCL
Bankr. Case No. 96-10559-WCH

In Re:

ANDREW J. KEHOE and CATHERINE M. KEHOE,

Debtor

THE MOTION* OF THE APPELLEE GARY W. CRUICKSHANK, CHAPTER 7 TRUSTEE, FOR AN ORDER DISMISSING THE APPEAL OF THE APPELLANTS ANDREW J. KEHOE, JR. AND JENNIFER KEHOE

Acting pursuant to and in accordance with the provisions of Rule 8011 of the Federal Rules of Bankruptcy Procedure, the appellee Gary W. Cruickshank, as he is the duly qualified and acting Chapter 7 trustee (the "Trustee") of the bankruptcy estate of Andrew J. Kehoe and Catherine M. Kehoe (the "Debtors"), hereby respectfully requests that this Court enter an order dismissing the appeal filed by the appellants, the Debtors' adult children, Andrew J. Kehoe, Jr. and Jennifer Kehoe (the "Debtors' Children") on the grounds that the appeal is moot.

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* Page 1 of the Motion.

Appendix A

In support hereof, the Trustee represents as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. On January 25, 1996, the Debtors filed a joint voluntary petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. §101, *et seq.*) (the "Bankruptcy Code").

Lindsay, D.J.
MOTION ALLOWED; No opposition having been filed.
by the Court

s/ [illegible]
Deputy Clerk

APPENDIX B — JUDGMENT OF DISMISSAL OF THE UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS DATED OCTOBER 25, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-11146-RCL

In Re: ANDREW J. KEHOE
AND CATHERINE M. KEHOE

JUDGMENT OF DISMISSAL

LINDSAY, D.J.

In accordance with the Court's Order of *October 25, 2000* allowing the motion to dismiss of the appellee *Gary W. Cruickshank*, Judgment is hereby entered as follows: *Judgment for the Appellee Gary W. Cruickshank* dismissing this action.

October 25, 2000

s/ [illegible]
Deputy Clerk